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No 317

Supreme Court of the United States.

OCTOBER TERM, 1941.

LINUS C. COGGAN

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

LAWRENCE E. GREEN,
Attorney for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

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v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Linus C. Coggan prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit entered in the above-entitled case on May 2, 1941.

Jurisdiction.

The judgment below was entered May 2, 1941. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Proceedings Below.

The Board of Tax Appeals decided in favor of the taxpayer on the point herein raised by decision entered November 9, 1939. This decision of the Board was reversed by the Circuit Court of Appeals for the First Circuit. The opinion of the Court is reported in 119 Fed. (2d) 504.

Question Presented.

Where the loss of the taxpayer's investment in real estate occurs as a result of a judicial decree of strict foreclosure or forfeiture on account of non-payment of taxes, and not by reason of any sale, is the loss a capital or ordinary loss under sections 23 (e) and (j) of the Revenue Act of 1934?

Summary Statement of Matter Involved.

The taxpayer was the owner of certain real estate in Boston, the record title to which stood in the name of a straw. The property was assessed by the City of Boston to the straw for the purposes of taxation. Under Massachusetts law the petitioner herein was not personally liable for the taxes, the assessment not having been made against him.

In 1930 on account of default in the payment of taxes the property was "sold" to the City of Boston. General Laws (Ter. Ed.) chapter 60, section 45, provides that "the title conveyed shall be held as security for the repayment of the purchase price with all intervening costs . . ." and consists merely of a lien, the holder of the right of redemption being considered as continuing to be the owner of the land. *Jenney* v. *Tilden*, 270 Mass. 92.

The only method provided for foreclosing the security title or lien thus created is by petition for foreclosure

brought in the Land Court not sooner than two years after the so-called "sale." General Laws (Ter. Ed.) chapter 60, sections 64 to 69.

In 1935, the tax year in question, a decree of strict foreclosure or forfeiture was entered by the Land Court foreclosing all rights of redemption.

The Circuit Court of Appeals for the First Circuit in effect agreed with the petitioner herein that the foregoing states a case of loss in 1935 through forfeiture and not a loss through sale, stating in its opinion:

> "As a fresh question we should have had difficulty in saying that the extinguishment of the taxpayer's interest by the decree of the land court in 1935 foreclosing his right of redemption after the so-called tax sale in 1930 was a 'sale or exchange' within the meaning of the statute. There is some force to the contention that the *Hammel* case, and our decision in *Welch* v. *Street*, 116 F. (2d) 953, are distinguishable in that in each of these cases the taxpayer's interest was extinguished by a 'sale', namely, a foreclosure sale in which the property was actually sold to the highest bidder; whereas in the case at bar the property was not put up for sale in 1935, but the taxpayer's right of redemption was forfeited in that year by the decree of the land court. . . ."

The Court, however, went on to state that a decision against the taxpayer was required by the decision of this Court in *Helvering* v. *Nebraska Bridge Supply & Lumber Co.*, decided March 31, 1941, reversing on certiorari the same case reported in 115 Fed. (2d) 288.

Reasons Relied on for Allowance of Writ.

1. The decision in this case is in conflict with the opinion of the Supreme Court in *Helvering* v. *Hammel*, 311 U.S. 504. In that case this Court said, page 512:

> "Respondents also advance the argument, sustained in *Commissioner* v. *Freihofer*, 102 F. 2d 787, that the definitive event fixing respondents' loss was not the foreclosure sale but the decree of foreclosure which ordered the sale and preceded it. But since the foreclosure contemplated by the decree was foreclosure by sale and the foreclosed property had value which was conclusively established by the sale for the purposes of the foreclosure proceeding, the sale was the definitive event establishing the loss within the meaning and for the purpose of the revenue laws. . . . The sale, which finally cuts off the interest of the mortgagor . . . is a means adopted by the statute for determining the amount of his capital gain or loss from the sale of the mortgaged property. . . . But there is nothing in this record to show that the land contract in this case contained a forfeiture clause. Even if it did, it does not appear that there was in fact a forfeiture apart from the sale on foreclosure. . . ."

It is respectfully submitted that the decision below ignores the distinction made in the *Hammel* case between a loss by forfeiture and a loss by sale.

2. *Helvering* v. *Nebraska Bridge Supply & Lumber Co.* is distinguishable.

Under the Arkansas law, involved in that case, there was an actual sale, although subject to a right of redemption terminating upon the mere expiration of a fixed period of

time and the execution of a deed by the proper officer, a purely ministerial and clerical act. Under these circumstances "the sale was the definitive event . . . which finally cuts off the interest" of the owner. In the case at bar the definitive event was a judicial decree entered in a plenary suit, a fact which is recognized by the court below.

3. Obviously the question involved in this case is one of frequent recurrence, not only in the Commonwealth of Massachusetts, but in such other states as may have similar laws relative to the taxation of real property. As such the matter involved is one of general importance.

Respectfully submitted,

LAWRENCE E. GREEN,
Attorney for Petitioner.

DAVID BURSTEIN,
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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 317

LINUS C. COGGAN, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 9–14) is not officially reported. The opinion of the Circuit Court of Appeals (R. 35–42) is reported at 119 F. (2d) 504.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 2, 1941 (R. 42). The petition for a writ of certiorari was filed July 28, 1941. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the loss sustained by the taxpayer upon the final extinguishment of his interest in certain realty by a decree which followed a tax sale and foreclosed all rights of redemption is a capital loss under Section 117 of the Revenue Act of 1934, deductible only to the extent limited by the statute, or is an ordinary loss, deductible in full, under Section 23 (e) of the Act.

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra,* pp. 8–12.

STATEMENT

The facts, as stipulated (R. 26–30) and as found by the Board (R. 10–13), may, in so far as material to the issue presented here,[1] be stated as follows:

In 1927 the taxpayer advanced $10,000 to one George H. Bruce, who also owed the taxpayer $5,000 for legal services. The taxpayer received as security for the payment of the $15,000, a mortgage on

[1] In addition to the question involving the treatment of the loss as to the real property presented in the petition for certiorari, the case below also involved an issue concerning the treatment of a loss on certain shares of stock, likewise decided against the taxpayer (R. 39–41), and a dispute as to the amount of the taxpayer's basis for the realty, which was not decided, since the decision as to the limited deductibility of both losses rendered that dispute immaterial (R. 41–42).

certain real estate in Boston. The mortgage was executed by Eva M. Cann who was the owner of record of the property as a straw for Bruce. The debt secured by the mortgage was evidenced by a note for $15,000 on which Miss Cann appeared as maker. Bruce did not endorse the note. Miss Cann was a person of no financial responsibility. The taxpayer, who was on a cash basis, never reported as income the $5,000 charged for legal services (R. 10–11).

Later in 1927, Miss Cann conveyed the property to Mary A. Gallant subject to the mortgage. In 1928, Mary A. Gallant conveyed the property to Mary E. Coutere, also subject to the mortgage (R. 11).

On March 24, 1930, because of a default in payment on the note and failure to pay taxes on the property, the taxpayer, acting under a statutory power of sale contained in the mortgage, foreclosed the mortgage by selling the property at public auction. The successful bidder was the mortgagor, Miss Cann, again acting as straw for Bruce. Although the bid price was nominally $7,500 no money actually changed hands. The deed executed pursuant to the sale conveyed the property to Miss Cann subject only to unpaid taxes. At the same time, by prearrangement, Miss Cann gave the taxpayer a new mortgage for $15,000. All the instruments were recorded on April 21, 1930. No payments of principal had been made on the mortgage prior to the foreclosure (R. 11).

Local real estate taxes assessed on April 1, 1929, being in arrears, there was a tax sale by the City of Boston on August 26, 1930, in accordance with Massachusetts General Laws, c. 60, and the city became the purchaser at the sale (R. 11). Under the Massachusetts law, the bid price at a tax sale is of necessity the amount of unpaid taxes and interest (§ 43). The owner remains in possession, with a statutory right of redemption which persists until final foreclosure proceedings which cannot be instituted until a lapse of two years. Massachusetts General Laws, c. 60, §§ 62, 65.

In 1932, Miss Cann conveyed her equity of redemption "subject to all unpaid taxes, outstanding tax titles * * * and assessments if any there are" to Norine C. Murphy, a straw for the taxpayer. The conveyance was made in lieu of foreclosure by the taxpayer, and as part of the arrangement, it was understood that the taxpayer would make no further claim against Miss Cann or Bruce personally on account of the mortgage debt (R. 11–12).

On September 13, 1935, in accordance with the provisions of Massachusetts General Laws, c. 60, § 65, the City of Boston filed a petition in the Land Court to foreclose all rights of redemption remaining after the tax sale of August 26, 1930. A final decree was entered in the Land Court on December 14, 1935, forever foreclosing all rights to redeem by the owner of the equity, the mortgagee or creditors (R. 12).

In his income tax return for 1935, the taxpayer claimed a deduction of $8,983.37 as a loss on the

real estate, computed upon a cost of $10,000, less depreciation of $1,016.63. The Commissioner, after adjusting the basis to $7,500, determined that the loss was a capital loss deductible only subject to the limitations of Section 117 of the Revenue Act of 1934 (R. 6–8, 12–13).

The Board of Tax Appeals held that the loss was an ordinary loss deductible in full (R. 13–14). The court below reversed the Board (R. 35–42).

ARGUMENT

The court below correctly held that the loss sustained by the taxpayer upon the final extinguishment of his interest in the realty by the decree of foreclosure which followed the "tax sale" for nonpayment of local taxes is a capital loss deductible only subject to the restrictions imposed by Section 117 of the Revenue Act of 1934, 48 Stat. 680.

In *Helvering* v. *Hammel,* 311 U. S. 504, and *Electro-Chemical Co.* v. *Commissioner,* 311 U. S. 513, this Court decided that the statutory provisions limiting the deductions of losses from "sales or exchanges of capital assets" were applicable to a loss suffered by reason of a mortgage foreclosure, notwithstanding the "involuntary" nature of the transaction. While the court below observed in passing (R. 41) that, as "a fresh question," it might have had "difficulty" in holding that the extinguishment of the taxpayer's interest by the foreclosure decree after the tax sale was a "sale or exchange" within the meaning of the statute, it

properly recognized (R. 41) that all doubt had been removed and that this result was required by the decision in *Helvering* v. *Nebraska Bridge Supply & Lumber Co.*, decided by this Court on March 31, 1941, No. 776, October term, 1940, reversing the Circuit Court of Appeals for the Eighth Circuit (115 F. (2d) 288), upon the authority of the *Hammel* and *Electro-Chemical* cases. Under the principles enunciated by this Court, the taxpayer's loss would be a capital loss even though he were not personally liable for the local taxes,[2] as he asserts (Pet. 2), since consideration moving to the taxpayer in the "sale" is not necessary. See *Welch* v. *Street*, 116 F. (2d), 953 (C. C. C. 1); cf. *Helvering* v. *Nebraska Bridge Supply & Lumber Co.*, 115 F. (2d) 288 (C. C. A. 8).

There is no reason for any different treatment of the taxpayer's loss, as suggested (Pet. 4), merely because here the sale preceded—while in the *Ham-*

[2] Although the property was held of record in the name of a straw, the taxpayer was the real owner—otherwise there would be no basis for his claim to any deduction—and as such was personally liable for the real-estate taxes. Under Massachusetts law, a mortgagor and mortgagee are joint owners for purposes of taxation (General Laws of Massachusetts, c. 59, Section 14), and while the mortgagee is liable for the tax only in proportion to his interest (*id.*, Sections 12 and 13), the taxpayer, being both the mortgagee and the real owner, was liable for the entire tax, which constitutes a lien on the real estate (*id.*, c. 60, Section 37), and which the collector may levy and collect by distress or seizure and sale (*id.*, Sections 24 and 25), or by imprisonment (*id.*, Section 29), or by suit (*id.*, Section 35), or by sale or taking of the property (*id.*, Sections 37 and 43).

mel case the sale followed—the decree of foreclosure, which under the circumstances rendered final the taxpayer's loss from the "sale" and thus furnished "the definitive event establishing the loss within the meaning and for the purpose of the revenue laws." *Helvering* v. *Hammel,* 311 U. S. at 512. There is clearly no conflict, as urged (Pet. 4), with the *Hammel* case, nor is the instant case distinguishable, as asserted (Pet. 4–5), from the *Nebraska Bridge* case. The way in which the taxpayer's loss from the prior tax sale acquired finality in this case under the law of Massachusetts (General Laws, c. 60, Sections 62 and 65, *infra*), is not different in substance from the method by which the loss from the prior sale involved in the *Nebraska Bridge* case became final.

CONCLUSION

The decision below correctly follows the controlling decisions of this Court. There is no conflict of decisions, and no question calling for any further review by this Court. The petition should therefore be denied.

Respectfully submitted.

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AUGUST 1941.

APPENDIX

Revenue Act of 1934, 48 Stat. 680:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(e) LOSSES BY INDIVIDUALS.—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

* * * * *

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

* * * * *

(j) CAPITAL LOSSES.—Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in section 117 (d).

* * * * *

(U. S. C., Title 26, Sec. 23.)

* * * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) GENERAL RULE.—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

* * * * *

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

* * * * *

(b) DEFINITION OF CAPITAL ASSETS.—For the purposes of this title, "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

* * * * *

(d) LIMITATION ON CAPITAL LOSSES.—Losses from sales or exchanges of capital assets shall be allowed only to the extent of $2,000 plus the gains from such sales or exchanges. * * *

* * * * *

(U. S. C., Title 26, Sec. 101.)

General Laws of Massachusetts (1921), Vol. 1, c. 60:

COLLECTION OF LOCAL TAXES

SECTION 43. If the taxes are not paid, the collector shall, at the time and place appointed for the sale, sell by public auction, for the amount of the taxes and necessary intervening charges, the smallest undivided part of the land which will bring said amount, or the whole for said amount, if no person offers to take an undivided part; * * *.

* * * * *

SECTION 45. The collector shall execute and deliver to the purchaser a deed of the land, * * *. The deed shall convey the land to the purchaser, subject to the right of redemption. The title thus conveyed shall,

until redemption or until the right of redemption is foreclosed as hereinafter provided, be held as security for the repayment of the purchase price, with all intervening costs, terms imposed for redemption and charges, with interest thereon, * * *. No sale hereafter made shall give to the purchaser any right to possession of the land until the expiration of two years after the date of the sale.

* * * * *

SECTION 48. If at the time and place of sale no person bids for the land offered for sale an amount equal to the tax and charges, and if the sale has been adjourned one or more times, the collector shall then and there make public declaration of the fact; and, if no bid equal to the tax and charges is then made, he shall give public notice that he purchases for the town by which the tax is assessed said land as offered for sale at the amount of the tax and the charges and expenses of the levy and sale, which amount shall be allowed him in his settlement with such town.

* * * * *

SECTION 50. If the town becomes the purchaser, the deed to it, in addition to the statements required by section forty-five, shall set forth the fact that no sufficient bid was made at the sale or that the purchaser failed to pay the amount bid, as the case may be, and shall confer upon such town the rights and duties of an individual purchaser.

* * * * *

SECTION 62. Any person having an interest in land taken or sold for non-payment of taxes, * * * may, within two years after the taking or sale, redeem the same by paying or tendering to the collector, if the estate has been taken or purchased by the town, the amount of the tax, all intervening

taxes, charges and fees, and interest on the whole at the rate of eight per-cent per annum; * * *.

* * * * *

SECTION 64. The title conveyed by a tax collector's deed or by a taking of land for taxes shall be absolute after foreclosure of the right of redemption by decree of the land court as provided in this chapter. The land court shall have exclusive jurisdiction of the foreclosure of all rights of redemption from titles conveyed by a tax collector's deed or a taking of land for taxes, in a proceeding provided for in sections sixty-five to seventy-five, inclusive.

SECTION 65. After two years from a sale or taking of land for taxes, whoever then holds the title thereby acquired may bring a petition in the land court for the foreclosure of all rights of redemption thereunder. * * *

SECTION 66. Upon the filing of such a petition the court shall forthwith cause to be made by one of its official examiners an examination of the title sufficient only to determine the persons who may be interested in the same, and shall upon the filing of the examiner's report notify all persons appearing to be interested, whether as equity owners, mortgagees, lienors, attaching creditors or otherwise, of the pendency of the petition, * * *. The notice * * * shall contain a statement that unless the party notified shall appear within the time fixed a default will be recorded, the petition taken as confessed, and the right of redemption forever barred.

SECTION 67. After the return day fixed, to be at least twenty days after the time of the actual issuance of notice, the court shall, if satisfied that the notice has been properly given, on motion of the petitioner enter an

order defaulting all persons failing to appear, and decreeing that the petition as to them be taken as confessed.

SECTION 68. Any person claiming an interest, within ten days after entering his appearance or within such further time as may on motion be allowed by the court, shall, if he desires to redeem, file an answer setting forth his right in the premises, together with all matters which in equity and good conscience entitle him to redeem, and an offer to redeem upon such terms as may be fixed by the court. Thereupon the court shall hear the parties, and, if good cause is shown therefor, may make a finding allowing the party to redeem, within a time fixed by the court, upon payment to the petitioner of an amount sufficient to cover the original sum, costs, interest at the rate of eight per-cent per annum, and all subsequent taxes, costs and interest to which the petitioner may be entitled under section sixty-one or sixty-two, together with the costs of the proceeding and such counsel fee as the court deems reasonable. The court may impose such other terms as justice and the circumstances warrant.

SECTION 69. If a default is entered under section sixty-seven, or on motion for failure to file answer, or if redemption is not made within the time and upon the terms fixed by the court under the preceding section, or if at the time fixed for the hearing the person claiming the right to redeem does not appear to urge his claim, or if upon hearing the court determines that the facts shown do not entitle him to redeem, a decree shall be entered which shall forever bar all rights of redemption.

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